FINAL BRIEF **ORAL ARGUMENT NOT YET SCHEDULED**

Nos. 07-1398, 07-1471

GOYA FOODS, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

FRED B. JACOB
Supervisory Attorney

MacKENZIE FILLOW
Attorney

National Labor Relations Board
1099 14th Street NW
Washington, DC 20570
202-273-2971
202-273-4485

RONALD MEISBURG
General Counsel
JOHN E. HIGGINS, JR.
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GOYA FOODS, INC.	)	
	)	Nos. 07-1398 and 07-1471
Petitioner/Cross-Respondent	)	
v.	)	Board Case Nos.
	)	12-CA-21168, 12-CA-21197,
NATIONAL LABOR RELATIONS BOARD	)	12-CA-21787, and 12-CA-22225
	)	
Respondent/Cross-Petitioner	)	

THE BOARD'S CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Local Circuit Rule 28(a)(1), the National Labor Relations Board respectfully submits the following Certificate as to Parties, Rulings, and Related Cases:

A. Parties and Amici

1. Goya Foods of Florida ("the Company") was the respondent before the Board and is the Petitioner and Cross-Respondent before the Court.

2. The Board is the Respondent and Cross-Petitioner before the Court; its General Counsel was a party before the Board.

3. The Union of Needletrades, Industrial, and Textile Employees ("UNITE!") was the charging party before the Board.

B. Rulings Under Review

The Company is seeking review of a Decision and Order of the Board (Members Liebman, Schaumber, and Kirsanow) in Board Case Nos. 12-CA-21168, 12-CA-21197, 12-CA-21787, and 12-CA-22225, finding that the Company unlawfully made changes to terms and conditions of employment without bargaining with the union chosen by its employees. The Board issued its decision

on August 23, 2007, and reported it at 350 NLRB No. 74. That decision is located at Tab 7 in the Appendix.

C. Related Cases

This case has not previously been before this Court.

The Eleventh Circuit, in a case involving the same parties, enforced a prior Board decision finding that the Company illegally withdrew recognition from the Union. The Board's decision in that case was issued on August 30, 2006 and reported at 347 NLRB No. 103, and the Eleventh Circuit decision enforcing the Board's Order can be found at __ F.3d __, 2008 WL 1821734 (11th Cir. Apr. 24, 2008) ("*Goya I*").

In addition, a third case involving these parties is also pending before this Court, *Goya Foods of Florida v. NLRB*, Nos. 07-1451, 07-1482; briefing in these cases is scheduled to be complete on June 23, 2008. The Board's decision in that case was issued on September 28, 2007 and reported at 350 NLRB No. 13.

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2960

May 22, 2008

TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS

Headings – Cont'd **Page(s)**

TABLE OF CONTENTS

Headings – Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases: **Page(s)**

---

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases --cont'd: **Page(s)**

---

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases --cont'd: **Page(s)**

---

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases --cont'd: **Page(s)**

---

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases --cont'd: **Page(s)**

---

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases --cont'd: **Page(s)**

Statutes **Page(s)**

* National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

---

* Authorities upon which we chiefly rely are marked with asterisks.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 07-1398 and 07-1471

GOYA FOODS, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Goya Foods, Inc., doing business as Goya Foods of Florida ("the Company"), to review an Order of the National Labor Relations Board ("the Board") issued against the Company on August 23, 2007 and reported at 350 NLRB No. 74.[1] The Board has cross-applied

---

[1] A. Tab 7. "A." references are to the appendix, and "S.A." references are to the supplemental appendix. "Br." refers to the Company's opening brief. References

for enforcement of that Order. The Board's Order is a final order with respect to all parties under Section 10(e) and (f) of the National Labor Relations Act ("the Act"), as amended.[2]

The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the Act,[3] which empowers the Board to prevent unfair labor practices. The Company's petition, filed on October 3, 2007, and the Board's cross-application, filed on November 20, 2007, were timely; the Act places no time limitation on such filings. This Court has jurisdiction over both the petition for review and the cross-application for enforcement pursuant to Section 10(e) and (f) of the Act,[4] which provide that aggrieved parties may file petitions for review of Board orders in this Court and that the Board may file cross-applications for enforcement.

---

preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[2] 29 U.S.C. §§ 151, 160(e) and (f).

[3] 29 U.S.C. § 160(a).

[4] 29 U.S.C. §§ 160(e) and (f).

STATEMENT OF THE ISSUES PRESENTED

1. **Summary Enforcement.** The Board found that the Company violated the Act by eliminating the drivers' ability to decide the order of their deliveries. In its opening brief, the Company failed to challenge this finding. Is the Board entitled to summary enforcement of this uncontested finding?

2. **Unilateral Changes.** It is illegal for an employer to make changes to work assignments, wages, or hours without bargaining with the representatives of its employees. Without notifying or bargaining with the Union, the Company made numerous work assignments to sales and delivery employees, changed the hours of its warehouse workers, and engaged in subcontracting that affected employee wages. Does substantial evidence support the Board's finding that these unilateral changes violated Section 8(a)(5) and (1)?

3. **Changed Circumstances.** Section 10(e) of the Act bars court review of objections not made before the Board. The Company admits that it never filed a motion for reconsideration or submitted any evidence to the Board from which the Board could have concluded that changed circumstances make enforcement of the Board's Order unfair or unworkable. Does the Court lack jurisdiction to consider the Company's changed circumstances argument?

PERTINENT STATUTES AND REGULATIONS

Relevant statutory and regulatory provisions are contained in the attached addendum.

STATEMENT OF THE CASE

This case is about changes the Company made to its employees' wages, hours, and conditions of employment without bargaining with its employees' union. It is well-settled that such changes violate Section 8(a)(5) and (1) of the Act.

Between October 30, 2000 and July 30, 2002, UNITE! ("the Union") filed a number of unfair labor practice charges against the Company.[5] Based on these charges, the Board's General Counsel issued a complaint on September 27, 2002 alleging, among other things, that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally assigning stores and routes to drivers and sales employees; changing the work schedule of warehouse employees; giving a driver's regular route to a non-unit contract driver; and eliminating the drivers' ability to effectively decide the order of their deliveries.[6] The Company made all of these changes without bargaining with the Union.

The Regional Director ordered a hearing, and an administrative law judge

[5] A. Tab 2.

[6] A. Tab 3.

heard argument and took evidence on February 24 and 25, 2003. The judge issued a decision on April 24, 2003, finding that the Company violated Section 8(a)(5) and (1) as alleged. On August 23, 2007, the Board affirmed the judge's findings and adopted the recommended order.[7]

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Company Committed Dozens of Unfair Labor Practices and Illegally Withdrew Recognition from the Union; the Board Found that the Company Violated the Act, and the Eleventh Circuit Enforced the Board's Order

The Company operates a facility in Miami, Florida where warehouse employees sort and package food products that the Company's drivers then deliver to stores. The Company also employs sales representatives who sell products to stores and stock shelves after the drivers make their deliveries.[8]

On September 2, 1998, the Union filed a petition with the Board seeking to represent the Company's employees.[9] As the Eleventh Circuit recently noted while enforcing a prior Board Order involving the Company's behavior before and after the petition, the Company immediately began "a widespread and lengthy anti-

[7] A. Tab 7.

[8] A. Tab 7, at 2.

[9] *NLRB v. Goya Foods of Florida*, __ F.3d __, 2008 WL 1821734, at *1 (11th Cir. Apr. 24, 2008) ("*Goya I*").

union campaign."[10] Among other violations, then-president Mary Ann Unanue and other managers "told numerous different groups of employees on multiple occasions that Goya would never recognize a union, and would not bargain with the Union even if the employees voted to unionize."[11]

The Board conducted elections on October 14 and November 12, 1998, and the Company's employees voted for union representation. In late 1998, the Board certified the Union as the representative of two units: (1) the Warehouse Employees and Drivers Unit and (2) the Sales Representatives and Merchandising Employees Unit.

The Company's opposition to the Union continued, however, as it "ultimately followed through on its pre-certification threats not to recognize or bargain with the Union" by committing additional unfair labor practices, including numerous refusals to bargain.[12] Due to the Company's repeated violations, the Union's support among unit employees diminished drastically during the first year of certification.[13] In December 1999, a majority of employees in each of the two

[10] *Id.* at *1.

[11] *Id.* at *2.

[12] *Id.* at *3.

[13] *Id.* at *4.

units signed disaffection petitions, and the Company withdrew recognition from the Union.

The Board subsequently determined that the Company's unfair labor practices caused the Union's loss of majority support.[14] Because "[a]n employer may not avoid its duty to bargain if its own unfair labor practices caused the union's loss of majority support," the Board held that the withdrawal of recognition violated Section 8(a)(5) and (1) of the Act and ordered the Company to bargain with the Union as a remedy.[15] On April 24, 2008, the Eleventh Circuit enforced the Board's Order: "Goya perpetrated numerous and extensive labor violations over the months leading up to certification and through the distribution of the disaffection petition."[16] The court ordered the Company to comply with the Board's Order and bargain with the Union.

B. The Company's Refusal to Recognize the Union Continued, and the Company Made a Variety of Unilateral Changes to Mandatory Subjects of Bargaining Without Notice to the Union

This case, *Goya II*, deals with a number of changes the Company made to its employees' wages, hours, and working conditions after it illegally withdrew recognition from the Union, but before the Eleventh Circuit's decision. The

[14] *Goya Foods of Florida*, 347 NLRB No. 103, slip op. at 4, 2006 WL 2540668, at *4 (2006).

[15] *Id*.

[16] *Goya I*, 2008 WL 1821734, at *6.

Company admits it failed to bargain with the Union over these changes or notify the Union about the changes in advance.[17]

1. The Company Made Work Assignments Without Bargaining With the Union

Before the Union's certification, the Company's drivers and sales employees serviced fixed routes and stores each week.[18] Once the Union was certified, it requested bargaining over the Company's unilateral changes in route and store assignments.[19] The Company refused to bargain, and the Board found that the Company's refusal violated the Act in *Goya I*. The Eleventh Circuit enforced that finding.[20]

Following its unlawful withdrawal of recognition, the Company continued refusing to bargain over changes in assignments. In August or September 2000, a new Sedano's Supermarket store, # 28, opened in Hialeah, Florida. Without notifying or bargaining with the Union, the Company assigned the store to driver Isain Navarro.[21] Navarro serviced Sedano's # 28 twice a week for a year.[22] In

---

[17] Br. 11; A. Tab 7, at 4; S.A. Tab 9, at 38.

[18] A. Tab 7, at 6.

[19] S.A. Tab 12.

[20] *Goya I*, 2008 WL 1821734, at *6.

[21] A. Tab 7, at 4; S.A. Tab 9, at 38, 87-88.

[22] S.A. Tab 9, at 87.

October 2000, the sales person assigned to Sedano's Supermarket store # 3 resigned. Without notifying or bargaining with the Union, the Company assigned the store to sales representative Hector Mora.[23] Sales and delivery employees receive commission, and these assignments affected the work hours and pay of Mora and Navarro.[24]

Reinol Orta worked a route in Little Havana for 4 years. During September, October, and December 2001, without bargaining with the Union, the Company gave Orta's regular route to contract drivers from an outside agency once or twice per week. The contract drivers who were given Orta's route sometimes called him for information about the route and the stores on it. As drivers earn commission on their deliveries, the change to his route necessarily affected Orta's wages.[25] In April 2002, the Company started regularly assigning Orta different routes, which made Orta's job more difficult because he services areas with which he is not familiar and it takes him longer to finish his deliveries.[26]

For several years prior to his testimony in this case, Miguel Then was assigned a route in the Hollywood/Dania area. In April 2002, the Company began

---

[23] A. Tab 7, at 3; S.A. Tab 9, at 30, 38.

[24] A. Tab 7, at 3-4; S.A. Tab 9, at 38-39, 77, 180-86; Tab 21.

[25] A. Tab 7, at 4; S.A. Tab 9, at 152-53.

[26] A. Tab 7, at 5-6; S.A. Tab 9, at 151, 156, 159.

sending Then to other areas, including Key West and Vero Beach. These changes had a significant impact on Then. The Hollywood and Dania areas are about 90 miles from the Miami warehouse, but Key West is 360 miles away. Being assigned to routes that are farther away and in geographic areas with which he is not familiar required Then to work longer hours, but he made less money because he was delivering fewer products to fewer stores.[27]

Eduard Arguello worked the US 1 route for 5 years before his testimony in this case. In April 2002, the Company started sending Arguello to make deliveries in different areas. It takes him longer to make deliveries to stores in areas he is not familiar with, which lengthens his work day by a couple of hours.[28]

2. The Company Changed the Schedules of Night Shift Warehouse Workers and Eliminated the Drivers' Ability to Effectively Decide the Order of Deliveries

On August 26, 2001, the Company informed night shift warehouse workers that they would have to report to work a half-hour earlier, changing their start time from 6 p.m. to 5:30 p.m.[29] On August 27, 2001, the Company disciplined warehouse employee Eduardo Miyares for an unexplained absence and numerous tardies. The Company reminded Miyares that "the starting time is 5:30 p.m. on the

[27] A. Tab 7, at 5; S.A. Tab 9, at 97-99.

[28] A. Tab 7, at 6; S.A. Tab 9, at 168-171.

[29] A. Tab 7, at 4; S.A. Tab 9, at 13, 240.

dot."[30] The Company never notified or bargained with the Union over this change in the start time.[31]

Prior to April 2002, delivery drivers effectively decided the order in which they would deliver to the stores on their routes.[32] Each night, the drivers received a call from someone at the Company asking them in what order they intended to make their deliveries the following day. The trucks would be loaded accordingly, with the last delivery at the front of the truck and the first delivery at the back of the truck.[33] In April 2002, without notifying or bargaining with the Union, the Company informed the drivers that they could no longer decide the order of deliveries for themselves. Instead, the Company began using its Road Net computer system, which it had already been using for other purposes for a year, to determine the order of deliveries.[34]

This change affected the drivers' hours.[35] Miguel Then testified that the Company does not always put the stores in the most sensible order. Two stores

---

[30] A. Tab 7, at 4; S.A. Tab 13-14; Tab 9, at 45.

[31] A. Tab 7, at 4; S.A. Tab 9, at 38.

[32] A. Tab 7, at 6; S.A. Tab 9, at 83.

[33] S.A. Tab 9, at 97.

[34] A. Tab 7, at 6; S.A. Tab 9, at 100-02, 155.

[35] S.A. Tab 9, at 102, 157.

located close to one another may not be scheduled for sequential delivery, requiring drivers to deliver to a store in one area, next deliver to a store in another area, and finally return to the first area to deliver to a third store.[36] Reinol Orta and Rodolfo Chavez testified that the drivers are more intimately familiar with the times during which the stores are willing to accept deliveries.[37] Because the Company's schedulers do not always have the most up-to-date information, the schedules are less efficient and deliveries take longer. The Company never notified or bargained with the Union prior to instituting this change.[38]

II. THE BOARD'S CONCLUSIONS AND ORDER

On August 23, 2007, the Board found, in agreement with the administrative law judge, that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally assigning new stores to sales representative Hector Mora and delivery driver Isain Navarro; assigning Reinold Orta's regular route to a contract driver several times; changing the start time for night shift warehouse workers; changing the routes of delivery drivers Reinold Orta, Miguel Then, and Eduardo Arguello; and eliminating the delivery drivers' ability to arrange the order of their deliveries. The Board concluded that the Company was obligated to bargain with the Union

[36] S.A. Tab 9, at 102.

[37] S.A. Tab 9, at 83, 157.

[38] A. Tab 7, at 6; S.A. Tab 9, at 38.

over these changes and held that the Company failed to establish any affirmative defense that would justify making such changes without bargaining.[39]

As a remedy, the Board's Order requires the Company to cease and desist from the unfair labor practices found and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. Affirmatively, the Board's Order requires the Company to rescind the unilateral changes that were found to violate the Act, notify and bargain with the Union before making any more changes in the terms or conditions of unit employees, make whole the employees who were affected by the unilateral changes, and post a remedial notice.[40]

SUMMARY OF ARGUMENT

This is the second case addressing the Company's ongoing efforts to avoid its employees' choice to select the Union as their bargaining representative. In a previous case, the Eleventh Circuit enforced the Board's finding that the Company illegally withdrew recognition from the Union and committed dozens of unfair labor practices, including several unilateral changes that the Company failed to contest.[41] This case deals with continued unilateral changes the Company made to

[39] A. Tab 7, at 1-2.

[40] A. Tab 7, at 2, 7.

[41] *Goya I*, 2008 WL 1821734.

its employees' wages, hours, and working conditions after it unlawfully withdrew recognition from the Union. A third case involving the Company is also pending before this Court,[42] and a fourth is pending before the Board.[43]

In its opening brief, the Company admits it has not bargained with the Union since August 2000 but nevertheless made numerous changes to its employees' terms of employment. Those changes include the assignment of work to sales and delivery employees, subcontracting work to persons outside the bargaining unit, changes to work hours, and the implementation of new delivery policies. It is indisputable that these matters are mandatory subjects of bargaining, and that an employer's refusal to bargain prior to making the changes violates the Act. Furthermore, the Company's affirmative defenses, that the changes at issue are de minimus, that the Company acted consistently with past practice, that the Board's litigation has been inconsistent, and that the charges in this case are untimely, were rejected by the Board and are without merit. Because substantial evidence supports the Board's Order, the Court should enforce it in full.

---

[42] *Goya Foods of Florida*, 351 NLRB No. 13 (2007) ("*Goya III*") (pending before this Court, Case Nos. 07-1451, 07-1482).

[43] *Goya Foods of Florida*, JD-05-08, 2008 WL 220198 (ALJ Jan. 23, 2008) ("*Goya IV*") (pending before the Board).

STANDARD OF REVIEW

This Court's review of the Board's factual conclusions is "highly deferential."[44] Under Section 10(e) of the Act, the Board's factual findings are "conclusive" if supported by substantial evidence on the record as a whole.[45] A reviewing court may not "displace the Board's choice between two fairly conflicting views" of the evidence, regardless of whether the Court might rule differently were it to consider the matter *de novo*.[46] In other words, this Court does not ask whether the Company's "view of the facts supports its version of what happened, but rather whether the Board's interpretation of the facts is reasonably defensible."[47] Accordingly, this Court has limited its review of Board decisions to whether they are supported by substantial evidence, or whether the Board "acted arbitrarily or otherwise erred in applying established law to the facts at issue."[48] The case for judicial deference is particularly appropriate here because of the

---

[44] *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1004 (D.C. Cir. 1998).

[45] 29 U.S.C. § 160(e).

[46] *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *accord Elastic Stop Nut Div. of Harvard Indus. v. NLRB*, 921 F.2d 1275, 1279 (D.C. Cir. 1990).

[47] *Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000).

[48] *Waterbury Hotel Management, LLC v. NLRB*, 314 F.3d 645, 650 (D.C. Cir. 2003) (internal quotation marks omitted).

Board's expertise in determining whether an employer has satisfied its bargaining obligations.[49]

ARGUMENT

The Eleventh Circuit recently enforced the Board's Order in *Goya I*, which ruled that the Company illegally withdrew recognition from the Union: "We find that the ALJ's opinion, adopted by the Board's Order, is supported by substantial evidence and that Goya perpetrated numerous and extensive labor violations over the months leading up to certification and through the distribution of the disaffection petition."[50] That court recognized "the particularly egregious nature of Goya's unfair labor practices."[51] Because the Company fully litigated its withdrawal of recognition before the Eleventh Circuit, it is precluded from relitigating that issue here,[52] making moot point two of the Company's brief asking that this case be held in abeyance.

In this case, *Goya II*, substantial evidence supports the Board's determination that the Company violated the Act by assigning stores to sales

---

[49] *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 684 (1944) ("[T]he Board [is] the expert in this field.").

[50] *Goya I*, 2008 WL 1821734, at *6.

[51] *Id.* at *2.

[52] *Venetian Casino Resort, LLC v. NLRB*, 484 F.3d 601, 609 (D.C. Cir. 2007) (quoting *Consol. Edison Co. v. Bodman*, 449 F.3d 1254, 1257-58 (D.C. Cir. 2006)).

employees and drivers and changing the hours of warehouse workers without bargaining with the Union. In addition, the Company's opening brief does not contest the Board's finding that the Company violated the Act by eliminating the drivers' ability to effectively decide for themselves the order in which they make deliveries. As shown below, the Company's defenses, including its claims regarding dynamic status quo and changed circumstances, have no merit. The Court should enforce the Board's Order.

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY ELIMINATING THE DRIVERS' ABILITY TO EFFECTIVELY DECIDE THE ORDER OF DELIVERIES ON THEIR ROUTES

The Board found that the Company violated Section 8(a)(5) and (1) by unilaterally changing a policy under which drivers effectively decided the order in which they would make the deliveries on their routes. This change affected the drivers' hours[53] and therefore violated the Act.[54] In its opening brief, the Company fails to make any argument that the Board's decision on this issue was

[53] S.A. Tab 9, at 102, 157.

[54] *International Woodworkers of America v. NLRB*, 458 F.2d 852, 859 (D.C. Cir. 1972) (work hours are a mandatory subject of bargaining).

wrong. Accordingly, the Board is entitled to summary enforcement of its Order with respect to this uncontested violation.[55]

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY CHANGING THE TERMS AND CONDITIONS OF EMPLOYMENT WITHOUT BARGAINING WITH THE UNION

A. An Employer Must Bargain With Its Employees' Representative

Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees."[56] It is well settled that an employer violates Section 8(a)(5) if it unilaterally changes terms and conditions of employment absent a lawful bargaining impasse.[57]

While Section 8(a)(5) requires an employer to bargain collectively, Section 8(d) explains what it means to do so: "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."[58] These categories, "wages, hours,

---

[55] *Carpenters & Millwrights, Local Union 2471 v. NLRB*, 481 F.3d 804, 808 (D.C. Cir. 2007) ("[T]he Board is entitled to summary enforcement of the uncontested portions of its order.")

[56] 29 U.S.C. § 158(a)(5).

[57] *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991); *Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1084-85 (D.C. Cir. 1991).

[58] 29 U.S.C. § 158(d).

and other terms and conditions of employment," are referred to as mandatory subjects of bargaining. It is indisputable that increases or decreases to employees' pay and work hours, changes in work assignments, and decisions to transfer bargaining unit work to a contractor are mandatory subjects of bargaining.[59] An employer takes a risk in making such changes after a withdrawal of recognition; if the withdrawal is deemed illegal, the unilateral changes violate Section 8(a)(5).[60]

The Supreme Court has stated that unilateral changes are a *per se* violation of the Act and "must be viewed as tantamount to an outright refusal to negotiate on that subject, and therefore as a violation of § 8(a)(5)."[61] This Court has noted the serious damage inflicted by an employer's implementation of unilateral changes:

> A unilateral change not only violates the plain requirement that the parties bargain over "wages, hours, and other terms and conditions," but also injures the process of collective bargaining itself. "Such unilateral action minimizes

---

[59] *Daily News of Los Angeles v. NLRB*, 73 F.3d 406, 410 (D.C. Cir. 1996) ("Because the program involved employee wages, we have no difficulty concluding that it was [a mandatory bargaining subject]."); *United Mine Workers of America, Dist. 31 v. NLRB*, 879 F.2d 939, 942 (D.C. Cir. 1989) ("It is agreed that subcontracting of bargaining unit work is a mandatory subject of bargaining."); *International Woodworkers of America, AFL-CIO, Local 3-10 v. NLRB*, 458 F.2d 852, 859 (D.C. Cir. 1972) ("The right to fix working hours . . . [is], of course, [a] mandatory bargaining subject[]."); *Boise Cascade Corp. v. NLRB*, 860 F.2d 471, 474 (D.C. Cir. 1988) ("[W]ork assignments . . . are mandatory subjects of bargaining.").

[60] *Virginia Concrete Co., Inc. v. NLRB*, 75 F.3d 974, 977 (4th Cir. 1996) ("Such unilateral changes are in violation of the Act if the Company's withdrawal of recognition was improper.").

[61] *NLRB v. Katz*, 369 U.S. 736, 746 (1962).

> the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent."[62]

For this reason, a violation of Section 8(a)(5) also derivatively violates Section 8(a)(1): unilateral changes tend "to interfere with, restrain, or coerce employees in the exercise of" their right to engage in concerted activity.[63] As the Supreme Court observed in *NLRB v. Katz*, unilateral changes "plainly frustrate[] the statutory objective of establishing working conditions through bargaining."[64]

B. The Board Reasonably Found that the Company's Unilateral Work Assignments Violated the Act

Work assignments are mandatory subjects of bargaining.[65] By making work assignments without bargaining with the Union, the Company violated the Act.[66]

---

[62] *NLRB v. McClatchy Newspapers*, 964 F.2d 1153, 1162 (D.C. Cir. 1992) (quoting *May Dep't Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945)).

[63] *Exxon Chem. Co. v. NLRB*, 386 F.2d 1160, 1164 (D.C. Cir. 2004) ("[A]n employer who violates section 8(a)(5) also, derivatively, violates section 8(a)(1).").

[64] *NLRB v. Katz*, 369 U.S. 736, 744 (1962).

[65] *Boise Cascade Corp. v. NLRB*, 860 F.2d 471, 474 (D.C. Cir. 1988) ("[W]ork assignments . . . are mandatory subjects of bargaining."). *See also AMF Bowling Co., Inc. v. NLRB*, 977 F.2d 141, 148 (4th Cir. 1992) ("Because a work assignment affects wages, hours, and conditions of employment, it is a mandatory subject of bargaining.").

[66] *Radisson Plaza Minneapolis*, 307 NLRB 94, 95 (1992), *enforced*, 987 F.2d 1376, 1381 (8th Cir. 1993) (the employer violated Section 8(a)(5) by refusing to bargain over, among other things, the assignment of hotel employees to the banquet department or the kitchen); *Don Lee Distributor, Inc.*, 322 NLRB 470, 494

The Company assigned Sedano's Supermarket # 3 to sales employee Hector Mora, assigned Sedano's Supermarket # 28 to delivery driver Isain Navarro, and changed the delivery routes of drivers Miguel Then, Reinol Orta, and Eduardo Arguello. The Company also assigned Reinol Orta's regular delivery route to a non-unit contract driver numerous times.

The Company admits that it made these assignments without bargaining with the Union. Each of these assignments affected the wages, hours, and working conditions of the employees involved. Although the Company proffers a variety of excuses defending its refusal to bargain over these work assignments, none have merit, as shown below. The Board was therefore reasonable in concluding that the Company violated the Act by refusing to bargain.

1. The Changes to Work Assignments Are Significant Because They Affected Employees' Wages

The Company first claims that the Company's changes to work assignments do not violate the Act, essentially suggesting that the changes in employee assignments are *de minimus*.[67] It is true that unilateral changes must be "material, substantial, and significant" to violate Section 8(a)(5).[68] Here, however, nothing

---

(1996), *enforced*, 145 F.3d 834, 840 (6th Cir. 1998) (unilateral changes to route assignments without bargaining with the union violated Section 8(a)(5)).

[67] Br. 31-32.

could be more "material, substantial, and significant" than the meteor-like impact the Company's unilateral changes in assignments and routes had on wages and work hours.

The drivers and sales employees work on commission, and the work assignments at issue affected their pay. For example, Sedano's Supermarket # 3, which was unilaterally assigned to sales representative Mora, bought $149,437 worth of merchandise from the Company in 2001, the year after it was assigned to Mora.[69] The addition of this store to Mora's work load is a significant change: he had to process the sale of almost $150,000 worth of merchandise. In addition, sales representatives earn between three and six percent commission, so the change in work load impacted Mora's pay.[70] This store assignment caused Mora to earn between $4,483 and $8,066 in the year after the assignment, and even pay *increases* without bargaining violate the Act.[71] Driver Navarro experienced a similar impact when the Company unilaterally assigned Sedano's Supermarket #

---

[68] *Microimage Display Div. of Xidex Corp. v. NLRB*, 924 F.2d 245, 253 (D.C. Cir. 1991) (internal citations omitted).

[69] S.A. Tab 21.

[70] S.A. Tab 9, at 184.

[71] *Daily News of Los Angeles v. NLRB*, 73 F.3d 406, 411 (D.C. Cir. 1996) ("The Act is violated by a unilateral *change* in the existing wage structure whether that change be an increase or the denial of a scheduled increase.") (quoting *NLRB v. Allied Prods. Corp.*, 548 F.2d 644, 652-53 (6th Cir. 1977)).

28 to him. That store bought $874.95 worth of merchandise on *one day* in October 2000.[72] Navarro delivered to this store twice a week for a year, and this extra work was a change that had a significant impact on Navarro. Furthermore, drivers make .75 percent commission on deliveries,[73] so this increase in Navarro's work load had a significant impact on his wages.

The Company cites, but appears to misunderstand, *Don Lee Distributor, Inc.*, a case that is directly on point and in fact supports the Board's position. In that case, the Board found that unilateral changes to delivery route assignments violated Section 8(a)(5) because the drivers were paid commission:

> The Company also changed the routes of Nick Dimitris, Ken Graham, Bob Lumsden, and Warren Griglio. Harris's route changed from a suburban route with fewer accounts, high volume, and a safe route, to what he considered to be an unsafe intercity route, with a third more accounts, but the sale of one-third fewer cases. Because they were then paid on a commission, his pay suffered.[74]

Even very small changes in pay have been found to be significant enough to constitute a violation of Section 8(a)(5). For example, in *Scepter Ingot Castings, Inc.*, the Board ruled that a fifteen cents per hour pay increase – probably less than

---

[72] S.A. Tab 19.

[73] S.A. Tab 9, at 87-88.

[74] *Don Lee Distributor, Inc.*, 322 NLRB 470, 494 (1996), *enforced*, 145 F.3d 834 (6th Cir. 1998).

the effect of the unilateral changes here – violated the Act, and this Court enforced that order. [75]

Furthermore, as this Court has noted, when determining whether a unilateral change is significant, the Board looks to "the context in which it occurred."[76] When an employer makes unilateral changes "as part of its concerted strategy to weaken and discredit the union in the eyes of the employees," and the changes "'could not help but undermine support for the union,'" the Board often finds that an "apparently unimportant change in a working condition takes on more significance."[77] Looking at this case together with the violations enforced by the Eleventh Circuit in *Goya I* makes clear that the changes at issue are significant.

The Company suggests that requiring it to bargain over the assignment of a single store would "make [the Union] the boss" of the Company because it would have to bargain daily before making a single assignment.[78] The Board's Order requires no such thing, and the argument demonstrates the Company's basic misunderstanding of the Act.

---

[75] *Scepter Ingot Castings, Inc.*, 331 NLRB 1509, 1514, 2000 WL 1234702, at *12 (2000), *enforced*, 280 F.3d 1053 (D.C. Cir. 2002).

[76] *Microimage Display Div. of Xidex Corp. v. NLRB*, 924 F.2d 245, 253 (D.C. Cir. 1991).

[77] *Id.* at 253.

[78] Br. 33.

The Company is free to comply with its bargaining obligation in any number of ways. The most common way to deal with this problem is through a clause in a collective-bargaining contract. The employer may negotiate for the right to unilaterally assign work at any time for any reason, or it may agree to assign work based any criteria important to the parties (such as seniority).[79] Ideally, had the Company not illegally withdrawn recognition from the Union, it would have engaged in such collective bargaining. "The concept of mandatory bargaining is premised on the belief that collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole."[80] Even absent a collective-bargaining agreement, however, exigent circumstances requiring prompt action may permit the Company to unilaterally assign work,[81] but the Company did not even attempt to show an

---

[79] *Industrial, Professional and Technical Workers*, 339 NLRB 825, 825-26 (2003) (collective-bargaining agreement gave employer "unfettered discretion in the assignment of work"); *Southern California Gas Co.*, 316 NLRB 979, 983-84 (1995) (management rights clause giving employer "exclusive right to . . . direct the working forces" permitted employer to assign work); *Hilton's Environmental, Inc.*, 320 NLRB 437, 444 (1995) ("The Union contract with Son[']s Quality Foods] provided that job assignments should be made on the basis of seniority.").

[80] *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 678 (1981).

[81] *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 734 (D.C. Cir. 2000) ("[A]n employer may act unilaterally if faced with an economic exigency justifying the change."); *RBE Electronics*, 320 NLRB 80, 82 (1995) (where "an employer is confronted with an economic exigency compelling prompt action short of the type relieving the employer of its obligation to bargain entirely, . . . the employer will

emergency here. Because the Company has any number of options available to it, the specter of daily bargaining over each assignment is nothing but a straw man. And the Board expresses no preference in the outcome so long as the Company fulfills its bargaining obligation.

2. The Company's Reliance on Past Practice or a Dynamic Status Quo is Unavailing

The Company next claims that the changes it made to work assignments (to sales employees and drivers) were consistent with a "dynamic status quo." Essentially, the Company argues that, because it could unilaterally change terms of employment before the Union's certification, it could continue to do so afterwards. As the Board stated, however, the Company's "'right to exercise sole discretion changed once the Union became the certified representative.'"[82] Once employees select union representation, the employer may no longer unilaterally change terms and conditions of employment when the union requests bargaining, as the Union did here.

---

satisfy its statutory obligation by providing the union with adequate notice and an opportunity to bargain"); *see also Indiana Hosp.*, 315 NLRB 647, 658-59 (1994) (holding that "the Hospital has not shown any compelling economic reasons for making these unilateral changes . . . in Huston's and Shaffer's work schedules").

[82] A. Tab 7, at 1 (quoting *Goya Foods of Florida*, 347 NLRB No. 103, slip op. at 3 (2007), *enforced*, __ F.3d __, 2008 WL 1821734, *1 (11th Cir. Apr. 24, 2008)).

In any event, the Board properly found that, even if it had legal merit, the Company's claim fails on the facts.[83] As the Board concluded:

> [T]he credited testimony here shows that while sales employees and drivers would not necessarily service the same stores every day, or even every week, there was an established practice by which they would service the same routes within a specific geographic area for extended periods of time (years in some cases) and would regularly return to many of the same stores within those routes. Consequently, we find no merit in the [Company's] defense that its store and route assignment changes were consistent with maintenance of an alleged dynamic status quo.[84]

The Company's argument boils down to a misguided claim that the Board should have credited the testimony of its president, Robert Unanue, who testified that employees never had fixed assignments, over that of the employees who testified to the contrary.

Substantial evidence, however, supports the Board's findings, and the Court should not disturb them. As noted above, the drivers testified that they drove the same routes for years. Miguel Then drove the Hollywood/Dania route for 4 and a half years. Reinol Orta worked the Little Havana route for 4 years. And Eduardo Arguello worked the US 1 route for approximately 5 years.[85] By contrast, President Unanue, on whom the Company relies to establish its past practice, only

---

[83] A. Tab 7, at 1-2.

[84] A. Tab 7, at 1-2.

[85] S.A. Tab 9, at 95, 97, 151, 158, 168-69.

began working at the Miami facility in 1999,[86] after the Union election. Thus, Unanue's testimony could not possibly support a finding that the changes in the present case are consistent with the status quo prior to unionization. Moreover, to the extent Unanue testified that "the method for assigning stores to sales employees had not changed in any way since . . . 1999, when he first arrived,"[87] the Company fails to acknowledge that Unanue arrived in the midst of an aggressive campaign of unfair labor practices, notably featuring numerous refusals to bargain over work assignments.[88] The Company presented no other evidence of the "dynamic status quo" as it existed prior to the Union's certification, and it is the Company's burden to prove such a defense.[89] The Board thus properly credited the testimony of the drivers over Unanue's claim that the drivers' routes were changed regularly. The Board was reasonable in rejecting the Company's past practices defense.

---

[86] S.A. Tab 9, at 210.

[87] Br. 34.

[88] *Goya I*, 2008 WL 1821734, at *2-3.

[89] *Sociedad Espanola de Auxilio Mutuo y Beneficiencia v. NLRB*, 414 F.3d 158, 166 (1st Cir. 2005); *see also City Cab Co. v. NLRB*, 787 F.2d 1475, 1478 (11th Cir. 1986) ("The burden is on the employer to show that [unilateral] changes satisfy this standard [continuation of the status quo]."); *NLRB v. Service Garage, Inc.*, 668 F.2d 247, 248 (6th Cir. 1982) ("[A]n employer . . . bears the burden of rebutting this presumption [that wage increase during union campaign violates the Act], perhaps by showing that the increase was consistent with past practice.").

3. The Assignment of Orta's Route to Contract Drivers Had a Significant Impact on His Terms and Conditions of Employment, Even if it Did Not Diminish Overall Bargaining Unit Work

The Company next claims that its re-assignment of Orta's route to a non-unit agency driver did not violate the Act because it did not diminish bargaining unit work.[90] Contrary to the Company's suggestion, however, unilateral subcontracting violates the Act if it has a significant impact on the terms and conditions of employees, just like any other unilateral change.[91] A reduction in bargaining unit work is often the most obvious impact that subcontracting has on employees' terms and conditions of employment, which is why the cases the Company cites discuss that fact. However, the Act is also violated if the subcontracting affects the employees' pay, as it did here. The Company's own brief admits this,

---

[90] Br. 39-41.

[91] *Newcor Bay City Division*, 351 NLRB No. 54, slip op. at 3, 2007 WL 4114031, at *4 (2007) (unilateral change involving subcontracting must have "material, significant and substantial effect on the terms and conditions of employment. . . . [T]he allegedly unlawful action's impact on employees must be examined."); *see, for example, Equitable Gas Co. v. NLRB*, 637 F.2d 980, 990 (3d Cir. 1981) (no violation by unilateral subcontracting where "no layoffs have resulted from the subcontracting practices and *no diminution of earnings* or loss of job opportunities have occurred") (emphasis added); *CII Carbon, LLC*, 331 NLRB 1157, 1157 n.2 (dismissal of 8(a)(5) allegation because "no bargaining unit employees were laid off *or otherwise adversely affected* as a result of the subcontracting") (emphasis added).

"highlight[ing] the necessity for *some impact* on the unit, *usually* the elimination of work formerly performed by unit employees."[92]

Here, the assignment of Orta's route to non-unit contract drivers affected Orta's wages, hours, and conditions of employment. Orta is paid commission, and his pay is therefore impacted by his work assignment. Changes in assignments have other impacts, too, as Orta testified that his job can take longer and be more difficult when he is sent on a different route in an unfamiliar area.[93] "[T]he Board is not precluded from finding an 8(a)(5) violation where the employer's unilateral decision affected only one employee."[94] The assignment of Orta's regular route to a contract worker had a significant impact on Orta, and the Company therefore violated the Act.

4. The Board's Findings Are Consistent, and the Charges Are Timely

Finally, the Company proffers two procedural defenses to the Board's finding that it unlawfully changed drivers and sales personnel work assignments without bargaining. Both defenses fail.

---

[92] Br. 40 (emphasis added).

[93] A. Tab 7, at 4; S.A. Tab 9, at 151-53, 156, 159.

[94] *Millwrights, Conveyors and Machinery Erectors Local Union No. 1031*, 321 NLRB 30, 32 (1996).

First, the Company assails as inconsistent the Board's findings of numerous violations by the Company for unilaterally changing employees' route and store assignments in *Goya I, Goya II,* and *Goya III*.[95] The Company accuses the Board of finding that the drivers' routes were fixed in 1998, then unlawfully varied in 2000, then fixed again in 2001, and unlawfully varied in 2002. In fact, all the routes were fixed at the time of the union election and certification in 1998, and – contrary to the Company's repeated assertions – remained fixed throughout the events of *Goya I, II,* and *III*, as the testimony in this case demonstrated.[96] Thus, the Company has unlawfully (and repeatedly) changed the routes of different drivers at different times, despite the Union's standing request to bargain over changes in employees' terms and conditions of employment since its certification in 1998. In sum, both parties have been remarkably consistent: the Company keeps violating the Act, and the Board keeps finding it liable.

Second, the Company complains that the charges in this case were untimely under Section 10(b) of the Act. Section 10(b) of the Act provides that "no complaint shall issue based upon any unfair labor practice occurring more than six

---

[95] Br. 21-25.

[96] *See* p. 27 above (discussing testimony showing that drivers and salespeople serviced the same routes each week).

months prior to the filing of the charge with the Board."[97] In *Local Lodge No. 1424 v. NLRB (Bryan Mfg. Co.)*, the Supreme Court explained that when "occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices," they are not time barred.[98] By contrast, when "conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice," the charge *is* time barred.[99]

The Company claims this case falls into the latter category and that the current violations are merely the effects of a change in route assignments made in 1999, outside the limitations period. However, as shown above, this case actually falls within the first category. The Company changed different drivers' routes at different times; each change constituted an independent violation. The facts giving rise to the work assignment allegations in this case occurred in 2002, and all the charges were filed within 6 months of the violations.[100] Essentially, the Company appears to be arguing that since it violated some of the drivers' rights in 1998 and

---

[97] 29 U.S.C. § 160(b).

[98] 362 U.S. 411, 416 (1960).

[99] *Id.* at 416-17.

[100] A. Tab 2.

1999 by unilaterally making work assignments, the Board cannot find it liable for subsequent similar violations. This is clearly not the case.

In pursuing its statute of limitations theory, the Company makes much of an off-the-cuff remark by the Board's trial counsel using the phrase "continuing violations." Those two words, however, carry none of the import the Company suggests. During the hearing, the Company asked the administrative law judge to dismiss the case under a doctrine that prevents the General Counsel from relitigating the same violation twice, an argument the Company did not repeat in its opening brief to this Court. The Board's trial counsel responded that "the Charging Party has filed numerous charges [against] Goya and a remedy is necessary to these continuing violations."[101] It is clear from the context that trial counsel was referring to the fact that the Company continues to violate the Act, not that the unilateral changes in this case are the continuing effects of an old decision. The only "decision" the Company made from which these violations stem is the decision to avoid unionization at all costs.

[101] S.A. Tab 9, at 127.

C. The Board Reasonably Found that the Company's Unilateral Decision to Change Warehouse Employees' Start Time Violated the Act

Hours of employment are a mandatory subject of bargaining, as this Court has noted.[102] Indisputably, the Company required overnight warehouse employees to report to work earlier, at 5:30 p.m. instead of 6 p.m., without bargaining with the Union.[103] The Board was reasonable in concluding that this change to the employees' work hours violated the Act.[104]

The Company claims that it did not have to bargain over the schedule change because it had no impact on employees.[105] However, the impact on employees is obvious: night shift warehouse employees are now required to be at work 30 minutes earlier every day. They face discipline if they do not report at the

---

[102] *International Woodworkers of America Local 3-10 v. NLRB*, 458 F.2d 852, 859 (D.C. Cir. 1972) ("The right to fix working hours . . . [is], of course, [a] mandatory bargaining subject[]."); *accord Meat Cutters Local 189 v. Jewel Tea Co*., 381 U.S. 676, 691 (1965) ("[P]articular hours of the day and the particular days of the week during which employees shall be required to work are subjects well within the realm of 'wages, hours, and other terms and conditions of employment' about which employers and unions must bargain.")

[103] A. Tab 7, at 4; S.A. Tab 9, at 13, 38, 45, 240.

[104] *Vincent Industries Plastics, Inc. v. NLRB*, 209 F.3d 727, 731 (D.C. Cir. 2000) (the employer violated Section 8(a)(5) by unilaterally adding 15 minutes to the shifts of its quality control employees); *see also Acme Die Casting v. NLRB*, 26 F.3d 162, 168 (D.C. Cir. 1994).

[105] Br. 43-46.

new, earlier time.[106] The Company's argument to the contrary flies in the face of common sense. A schedule change is the most basic violation of the Act, which requires bargaining over "wages, *hours*, and other terms and conditions of employment."[107]

This Court has held that a schedule change of 15 minutes each day violates the Act,[108] and a 1 hour change in a Saturday schedule violates the Act.[109] The change in this case is even more significant. As the Court noted in *Acme Die Casting*, "[t]he new schedule made a difference to the employees subject to it, and the employees were entitled to bargain about the changes through their duly elected representatives."[110] The cases cited by the Company are easily distinguishable. In *Mitchellace*, the Board found that enforcement of a long-standing policy on break times did not result in a significant change because it affected only some employees by only 2 or 3 minutes.[111] In *United States Postal*

---

[106] S.A. Tab 13-14; Br. 44 n.7.

[107] Section 8(d), 29 U.S.C. § 158(d).

[108] *Vincent Indus.*, 209 F.3d at 731.

[109] *Acme Die Casting*, 26 F.3d at 168.

[110] *Id.* at 168.

[111] 321 NLRB 191, 192-94 (1996).

Service,[112] the Board found that there was no change to the employees' schedule because policy had always limited their breaks to 10 minutes, and only a few employees on the third shift had violated the policy by taking an extra 5 minutes. In this case, however, there was a change, it was significant (30 minutes), and it affected all the night shift warehouse workers.

The Company states the employees actually made the schedule change by reporting to work earlier than required, and that "Goya merely acquiesced in their action."[113] The Board reasonably rejected the Company's contention, noting that at least one employee did not spur the change: the Company issued a warning to a warehouse worker, reminding him that "the starting time is 5:30 p.m. on the dot."[114] Even if it were true that it merely acquiesced to employee choice, however, the Company's actions would still constitute a violation of the Act. It is illegal for an employer to bargain directly with employees who have chosen union representation.[115] The Company violated the Act by requiring its night shift warehouse employees to report to work 30 minutes earlier every day.

---

[112] 275 NLRB 360, 360-61 (1985).

[113] Br. 45.

[114] A. Tab 7, at 4; S.A. Tab 13-14; Tab 9, at 45.

[115] *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 684 (1944).

III. THIS COURT LACKS JURISDICTION TO CONSIDER THE COMPANY'S CHANGED CIRCUMSTANCES AND DELAY ARGUMENTS BECAUSE THE COMPANY FAILED TO RAISE THEM BEFORE THE BOARD

Before this Court, the Company argues for the first time that changed circumstances and delay make enforcement of the Board's Order unfair or unworkable. The Company admits that it never put this issue before the Board in this case.[116] Judicial consideration is therefore precluded by Section 10(e) of the Act, which provides that "no objection that has not been urged before the Board … shall be considered by the Court" absent extraordinary circumstances.[117] As this Court has recognized, the Supreme Court has made clear that "'orderly procedure and good administration'" require that "'courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objections made at the time appropriate under its practice.'"[118]

The Board issued its Order in this case without any indication from the Company that circumstances had changed so much that the Board's remedy was inappropriate. This Court very recently explained the path the Company should have taken: "If aggrieved by the Board's remedy, [the Company] should have

---

[116] Br. 16-20.

[117] 29 U.S.C. § 160(e).

[118] *Harvard Indus., Inc. v. NLRB*, 921 F.2d 1275, 1284 (D.C. Cir. 1990) (quoting *United States v. L.A. Tucker Truck Lines, Inc*., 344 U.S. 33, 37 (1952)).

filed a motion for reconsideration pursuant to the Board's rules and regulations,"[119] explaining how circumstances have changed and why the Board's remedy is now inappropriate. No such motion was filed. Because the Board was never given the opportunity to address this issue, this Court lacks jurisdiction to consider the untimely challenges to the Board's remedy articulated for the first time in the Company's brief.[120] "To hold otherwise would be to set the Board up for one ambush after another."[121]

The Company claims that it would have been futile to file a post-order motion because the Board denied the Company's post-order motion for reconsideration in *Goya I*.[122] The Court has repeatedly rejected this argument, however, holding that "'the requirement that a litigant present such a petition is ordinarily not excused simply because the [agency] was unlikely to have granted it.'"[123] Under the Court's precedent, futility arguments have merit only where the

---

[119] *W&M Properties v. NLRB*, 514 F.3d 1341, 1345 (D.C. Cir. 2008).

[120] *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *Int'l Ladies' Garment Workers' Union v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975).

[121] *Quazite Div. of Morrison Molded Fiberglass Co. v. NLRB*, 87 F.3d 493, 497-98 (D.C. Cir. 1996).

[122] Br. 17.

[123] *W&M Properties*, 514 F.3d at 1346 (quoting *Georgia State Chapter Ass'n of Civilian Technicians v. FLRA*, 184 F.3d 889, 892 (D.C. Cir. 1999)).

agency "rested its decision on a ground neither party had argued, so long as a request for reconsideration appeared clearly doomed."[124] The Board decided this case on the basis of the arguments put forth by the parties, and the fact that the Board denied a motion for reconsideration in *Goya I* does not show that a motion for reconsideration in this case was "clearly doomed." *Goya I* and this case deal with different violations of the Act, for which the Board ordered different remedies. Although the supposed changed circumstances may not have justified modifying the remedy in *Goya I*, it is not impossible that the Board may have come to a different conclusion in this case, which deals with a different remedy. The Company, however, never gave the Board the chance.

[124] *Georgia State Chapter Ass'n of Civilian Technicians*, 184 F.3d at 892.

CONCLUSION

The Board respectfully requests the Court deny the petition for review and grant its cross-application for enforcement in full.

FRED B. JACOB
Supervisory Attorney

MacKENZIE FILLOW
Attorney

National Labor Relations Board
1099 14th Street NW
Washington, DC 20570
202-273-2971
202-273-4485

RONALD MEISBURG
General Counsel
JOHN E. HIGGINS, JR.
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel

May 2008

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GOYA FOODS, INC. Petitioner/Cross-Respondent v. NATIONAL LABOR RELATIONS BOARD Respondent/Cross-Petitioner	Nos. 07-1398 and 07-1471 Board Case Nos. 12-CA-21168, 12-CA-21197, 12-CA-21787, and 12-CA-22225

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and D.C. Circuit Rule 32(a), the Board certifies that its brief contains 8,650 words of proportionally-spaced type, and the word processing system used was Microsoft Word 2003.

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2960

May 22, 2008

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GOYA FOODS, INC. Petitioner/Cross-Respondent v. NATIONAL LABOR RELATIONS BOARD Respondent/Cross-Petitioner	Nos. 07-1398 and 07-1471 Board Case Nos. 12-CA-21168, 12-CA-21197, 12-CA-21787, and 12-CA-22225

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the Board's final answering brief in the above-captioned case have this day been served by first class mail to the following persons at the addresses listed below:

James C. Crosland
David C. Miller
Bryant Miller Olive, P.A.
One Biscayne Tower
2 South Biscayne Blvd., Suite 1480
Miami, FL 33131

Carlos G. Ortiz
Goya Foods, Inc.
100 Seaview Dr.
Seacaucus, NJ 07094

_____
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, N.W.
(202) 273-2960

May 22, 2008

STATUTORY ADDENDUM

STATUTORY ADDENDUM

Relevant provisions of the National Labor Relations Act,
29 U.S.C. § 151-69 (2000):

Sec. 7. [Sec. 157] Employees shall have the right to self- organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [Section 158(a)(3) of this title].

Sec. 8(a). [Sec. 158(a)] [Unfair labor practices by employer] It shall be an unfair labor practice for an employer--

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [Section 157 of this title];
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [Section 159(a) of this title].

Sec. 8(d). [Sec. 158(d)] [Obligation to bargain collectively] For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .

Sec. 10(e). [Sec. 160(e)] [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or

district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. . . . No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

Sec. 10(f). [Sec. 160(f)] [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.